

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*,

Plaintiffs,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

Case No. 4:05-cv-00329-GKF-SAJ

Declaration of Jay T. Jorgensen

1. My name is Jay T. Jorgensen. I represent the Tyson Defendants in this matter.
2. I hereby certify that counsel for Defendants and Plaintiffs met and conferred in good faith by telephone and correspondence on multiple occasions and, after a sincere attempt to resolve differences, were unable to reach an accord prior to the filing of the Motion to Compel Production of Plaintiffs' Working Models on June 12, 2008. I further certify that the locations of the offices of counsel rendered a personal conference on this matter infeasible.
3. The timeline below demonstrates that counsel for Defendants did meet and confer with Plaintiffs' counsel in good faith and in a sincere attempt to resolve the differences related to the production of working copies of the environmental models used by Drs. Engel and Wells in preparation of their expert reports. Only after Plaintiffs' repeated refusals to produce working copies of the models, or allow Defendants sufficient opportunity to obtain information needed to reproduce working copies of the models, did Defendants seek court intervention to compel the required production of this material.
4. On or about May 22, 2008 and May 29, 2008, Plaintiffs produced expert reports and underlying considered materials for Dr. Bernard Engel and Dr. Scott A. Wells, respectively. Plaintiffs' production included a large number of individual computer programs, input files, output files and data files related to the models used by Drs. Engel and Wells, but did not contain working copies of the models. *See* Third Declaration of Dr. Victor J. Bierman Jr., at ¶¶ 6-16 ("Third Bierman Decl.") (attached as Exh. A).
5. On or about May 28, 2008, Defendants first raised the concern that Plaintiffs had failed to comply with their discovery obligation to produce all of the documents and materials responsive to Defendants' Requests for Production related to the environmental models used by Drs. Engel and Wells in preparation of their expert reports. *See* May 29, 2008 Email from D. Page to M. Bond and R. George (attached as Exh. C).

6. On May 29, 2008, Plaintiffs responded that they believed all such “modeling information should be included in the ‘considered materials’ produced with Dr Engel’s and Dr Wells’ expert reports,” but indicated that a supplemental response and production “that we believe is duplicative of the items produced in the considered materials” would be provided “next week” to avoid any confusion. *Id.*
7. After consulting with defense experts, Defendants clarified their production request. On May 30, 2008, Defendants explicitly stated: “First and foremost [defense experts] need a working copy of each of the Models utilized by your experts. In layman’s terms they need the working version of the Models that Plaintiffs’ experts actually sat down and used. This is covered under Tyson Foods, Inc. April 17, 2008 Request for Production No. 1.” May 30, 2008 Email from M. Bond to D. Page (attached as Exh. D).
8. On June 2, 2008, Plaintiffs responded, again claiming that “the information you requested has been produced as considered materials,” and indicating that a supplemental response would be provided “this week” to confirm this point. June 2, 2008 Email from D. Page to M. Bond and R. George (attached as Exh. E).
9. During the week of June 2-6, 2008, I participated in several meet and confer phone calls with Plaintiffs on this matter. During the calls, I reiterated Defendants’ May 30th request for the production of “a working copy of each of the Models utilized by [Plaintiffs’] experts.” In the alternative, I requested that Plaintiffs allow defense experts to view the working models of Plaintiffs’ experts so that they would be able to reproduce the models. Plaintiffs again refused, stating that such a production would not be technically feasible and that all required disclosures had been included in the considered materials produced with the expert reports.
10. On June 10, 2008, Plaintiffs once again claimed that their supplemental response – which was originally to be provided during the week of June 2-6 – would be provided in the near future to “show Defendants’ counsel and their modeling expert that the requested files *had already been produced* and that these files could be used to run the water quality models used by Drs. Engel and Wells.” Pls.’ Opp. to Defs.’ Mot. to Compel, at ¶ 8 (June 30, 2008, Docket #1737) (emphasis in original).
11. In light of Plaintiffs’ repeated refusal to produce working copies of the models, Plaintiffs’ claims that the material had already been produced, and the narrow time-frame in which Defendants are currently required to submit defense expert reports – Defendants determined that court intervention was necessary to compel the timely production of this material. Accordingly, Defendants filed the present Motion to Compel on June 12, 2008.
12. Plaintiffs did not provide any supplemental information related to the models used by Drs. Engel and Wells until *after* Defendants filed the present Motion to Compel. *See, e.g.,* June 13, 2008 Ltr. from D. Page to M. Bond (attached as Exh. J).
13. Upon receipt of this supplemental information, Defendants have continued to make every effort to resolve this issue without court intervention. *See, e.g.,* June 17, 2008 Email from J. Jorgensen to L. Ward (attached as Exh. F). To this end, Defendants have

suggested several alternative methods through which defense experts would be able to reproduce working copies of the models used by Plaintiffs' experts, such as (i) 1-day depositions of Plaintiffs' modeling experts to determine the process used to assemble the models, *see, e.g.*, June 27, 2008 Email from J. Jorgensen to L. Ward (attached as Exh. G); or (ii) providing a written protocol for assembling the models, *see* June 30, 2008 Email from J. Jorgensen to L. Ward (attached as Exh. H).

14. To date, Plaintiffs have refused Defendants' suggested methods for resolving this issue and have still failed to provide Defendants with working copies, or sufficient information to reproduce working copies, of the models utilized by Drs. Engel and Wells. *See* Third Bierman Decl. at ¶¶ 6-16.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 7, 2008
